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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 MARK ELLIS,

Civil No. 09-3040-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 MICHAEL J. ASTRUE,
14 Commissioner of Social Security,
15 Defendant.

16 Arthur W. Stevens III
17 Black, Chapman, Webber, Stevens,
18 Petersen & Lundblade
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18 Medford, Oregon 97501
19 Attorney for plaintiff

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27 Attorneys for defendant

28 AIKEN, Chief Judge:

1 Claimant, Mark Ellis, brings this action pursuant to the
2 Social Security Act (the Act), 42 U.S.C. §§ 405(g) and
3 1383(c)(3), to obtain judicial review of a final decision of the
4 Commissioner denying his application for disability insurance
5 benefits (DIB) under Title II of the Act. For the reasons set
6 forth below, the Commissioner's decision is reversed and remanded
7 for payment of benefits.

8 **PROCEDURAL BACKGROUND**

9 Plaintiff filed an application for DIB on January 20, 2006.
10 Tr. 93-98. He alleged disability since April 1, 2002. Tr. 31.
11 Plaintiff was last insured on December 31, 2007. Tr. 31,33.
12 After the claim was denied initially and upon reconsideration, a
13 hearing was conducted on May 19, 2008 by an Administrative Law
14 Judge (ALJ). Tr. 4-24. On June 26, 2008, the ALJ issued a
15 decision denying the application. Tr. 28-43. After the Appeals
16 Council declined review, plaintiff filed a complaint in this
17 court.

18 **STANDARD OF REVIEW**

19 This court must affirm the Secretary's decision if it is
20 based on proper legal standards and the findings are supported by
21 substantial evidence in the record. *Hammock v. Bowen*, 879 F.2d
22 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
23 mere scintilla. It means such relevant evidence as a reasonable
24 mind might accept as adequate to support a conclusion."
25 *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting
26 *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)).
27 The court must weigh "both the evidence that supports and
28 detracts from the Secretary's conclusion." *Martinez v. Heckler*,

1 807 F.2d 771, 772 (9th Cir. 1986).

2 The initial burden of proof rests upon the claimant to
3 establish disability. *Howard v. Heckler*, 782 F.2d 1484, 1486
4 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
5 an "inability to engage in any substantial gainful activity by
6 reason of any medically determinable physical or mental
7 impairment which can be expected . . . to last for a continuous
8 period of not less than 12 months. . . ." 42 U.S.C. §
9 423(d)(1)(A).

10 The Secretary has established a five-step sequential
11 process for determining whether a person is disabled. *Bowen v.*
12 *Yuckert*, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1520,
13 416.920. First the Secretary determines whether a claimant is
14 engaged in "substantial gainful activity." If so, the claimant
15 is not disabled. *Yuckert*, 482 U.S. at 140; 20 C.F.R. §§
16 404.1520(b), 416.920(b).

17 In step two the Secretary determines whether the claimant
18 has a "medically severe impairment or combination of
19 impairments." *Yuckert*, 482 U.S. at 140-41; see 20 C.F.R.
20 §§ 404.1520(c), 416.920(c). If not, the claimant is not
21 disabled.

22 In step three the Secretary determines whether the
23 impairment meets or equals "one of a number of listed impairments
24 that the Secretary acknowledges are so severe as to preclude
25 substantial gainful activity." *Id.*; see 20 C.F.R. §§
26 404.1520(d), 416.920(d). If so, the claimant is conclusively
27 presumed disabled; if not, the Secretary proceeds to step four.
28 *Yuckert*, 482 U.S. at 141.

1 In step four the Secretary determines whether the claimant
2 can still perform "past relevant work." 20 C.F.R. §§
3 404.1520(e), 416.920(e). If the claimant can work, she is not
4 disabled. If she cannot perform past relevant work, the burden
5 shifts to the Secretary. In step five, the Secretary must
6 establish that the claimant can perform other work. Yuckert, 482
7 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e)-(g), 416.920(e)-(g).
8 If the Secretary meets this burden and proves that the claimant
9 is able to perform other work which exists in the national
10 economy, she is not disabled. 20 C.F.R. §§ 404.1566, 416.966.

11 **DISCUSSION**

12 1. The ALJ's Findings

13 At Step One the ALJ found that plaintiff had not engaged in
14 substantial gainful activity since his alleged disability onset
15 date of April 1, 2002, through his last date insured, December
16 31, 2007. Tr. 33, Finding 2.

17 At Step Two, the ALJ found that plaintiff had the following
18 severe impairments: degenerative disc disease of the lumbar
19 spine; degenerative joint disease of the knees bilaterally;
20 dementia/organic brain syndrome due to trauma; major depressive
21 disorder; personality disorder with schizotypal features; and
22 post-traumatic stress disorder. Tr. 33, Finding 3.

23 At Step Three, the ALJ found that plaintiff's impairments
24 did not meet or equal the requirements of a listed impairment.
25 Tr. 33, Finding 4. Further, the ALJ determined that plaintiff
26 had the residual functional capacity (RFC) to lift and carry 20
27 pounds occasionally and 10 pounds frequently; stand and walk six
28 hours in a eight hour workday; sit six hours in an eight hour

1 workday; with a sit and stand option with a change of position
2 every 30 minutes. Plaintiff was limited to occasional climbing,
3 stooping, kneeling, crouching and crawling and limited to simple
4 instructions and tasks. Finally, he was limited to occasional
5 contact with the general public. Tr. 34, Finding 5.

6 At Step Four, the ALJ found that plaintiff was not able to
7 perform his past relevant work. Tr. 37, Finding 6.

8 At Step Five, the ALJ found that, based on plaintiff's RFC,
9 plaintiff could perform work existing in significant numbers in
10 the national economy; specifically noting the positions
11 identified by the vocational expert (VE): garment sorter, table
12 worker, and hand stuffer. Tr. 38, Finding 10.

13 2. Plaintiff's Allegations of Error

14 Plaintiff was born on December 1, 1959, and was 48 years
15 old on the date last insured. Plaintiff has a high school
16 education.

17 Plaintiff argues the ALJ erred by failing to consider the
18 degree of his mental impairment in combination with his other
19 impairments which if considered, would compel a finding of
20 disability. Pl's Brief, p. 13-14. Plaintiff underwent a
21 psychological evaluation and extensive testing. Tr. 290-94.
22 Plaintiff met the criteria for schizotypal personality disorder.
23 He was assigned a GAF score of 45 indicating "serious impairment
24 in . . . occupational functioning . . . (e.g., unable to keep a
25 job[.])." Plaintiff's psychological testing, when taking the
26 Trails B Test, resulted in a score in the "brain damaged" range.
27 Tr. 292. Plaintiff's Trauma Symptom Inventory was "valid with no
28 attempt to exaggerate or minimize symptomatology," and was

1 consistent with a PTSD diagnosis. Moreover, plaintiff reported
2 auditory hallucinations, often hearing someone talk to him who
3 was not really there. Id. Plaintiff's cognitive testing (WAIS-
4 III) revealed that plaintiff was in the low-average to borderline
5 range of baseline functioning. His abstract verbal reasoning
6 ability was "quite impaired." He performed below average and
7 showed significant weakness in all sub-tests that measured fluid
8 intelligence. His social judgment was below average,
9 specifically resulting in difficulty making appropriate choices
10 in a variety of settings which would contribute to his difficulty
11 with work performance. Tr. 292-93.

12 Further, notes from the White City Veterans Administration
13 Medical Center where plaintiff resided indicated that regarding
14 his "work assignments" he was restricted by physical and mental
15 limitations. In June 2003, he was assigned a canteen prep work
16 position for four hours a day. On August 29, 2003, he was
17 terminated from his canteen aide position "due to medical
18 reasons." In September 2003, he was assigned to a detail worker
19 position from approximately 10:00 a.m. to 6:00 p.m., but "hours
20 will have to accommodate." On September 25, 2003, plaintiff
21 actually began working in this position but only "four hours per
22 day." Tr. 269-71. The records indicate that even given the
23 structured and sheltered work environment of the Veterans
24 Administration Residential Work Program (SSR 83-88), plaintiff
25 was capable of working at most only four hours per day and
26 required accommodation due to his impairments. I find no
27 substantiation of evidence in the record that due to plaintiff's
28 involvement in a sheltered workshop as part of the VA

1 rehabilitation program that plaintiff was therefore capable of
2 persisting in the equivalent of full-time sedentary work.
3 Occupational therapy programs in VA Domiciliaries are a sheltered
4 employment situation where work performed is not considered
5 substantial gainful activity for Social Security disability
6 purposes. See SSR 83-33.

7 On June 5, 2003, when plaintiff returned for a follow-up of
8 a right occipital lump and to check on a CT scan, he was reported
9 as appearing "to be somewhat confused," according to the report
10 by James Smith, M.D. Tr. 874. On October 2, 2006, Nurse
11 Practitioner Marcus Mayfield, FNP, one of plaintiff's primary
12 treating medical sources at the VA Medical Center in White City,
13 reported that plaintiff was apparently classified as permanently
14 disabled in terms of mental health disease/disability ("organic
15 brain syndrome") when plaintiff reported to the clinic to obtain
16 a disabled bus permit. Tr. 974-75.

17 Moreover, the ALJ erred in rejecting the conclusions of
18 Nurse Practitioner Geils based on the fact that she is not an
19 "accepted" medical source. Geils' opinion evidence, as a trained
20 nurse practitioner who had a treating relationship with plaintiff,
21 although classified as an "other" medical source, should not be
22 rejected simply because it is not from "acceptable medical
23 sources." 20 CFR section 416.913(a), (d); SSR 06-03p.
24 Considering SSR 06-03p, Geils' opinions are significant and
25 should be evaluated on key issues such as impairment severity and
26 functional effects.

27 The record supports plaintiff's combined effect of his
28 mental impairments, as objectively verified by examinations,

1 clinical observations and test results of several treating and
2 examining mental health medical sources, is of disabling
3 severity. I agree that when plaintiff's combination of mental
4 impairments is considered together with his medically verified
5 physical impairments, including those recognized by the ALJ, the
6 combined effect is disabling when given proper weight and
7 considered with the testimony of the Vocational Expert at the
8 hearing.

9 Further, the fact that plaintiff had been awarded a non-
10 service connected disability pension by the VA Administration
11 gave rise to the ALJ's duty to give such determination great
12 weight. Specifically, the Ninth Circuit holds that an ALJ must
13 consider the VA's finding in reaching a rating of disability, and
14 give that disability determination "great weight." McCartey v.
15 Massanari, 298 F.3d 1072, 1076 (9th Cir. 2002).

16 CONCLUSION

17 The Commissioner's decision is not based on substantial
18 evidence, and is therefore, reversed and remanded for payment of
19 benefits.

20 IT IS SO ORDERED.

21 Dated this 14 day of May 2010.

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25 /s/ Ann Aiken

26 Ann Aiken
27 United States District Judge
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